

Westways v. AMR, 05-56603

JAN 22 2008

BERZON, Circuit Judge, dissenting in part:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I part ways with the majority only on the decertification issue.

None of the cases relied upon by the majority, nor any others that I have found, address the situation presented here: The “new” information revealed when the defendants moved for decertification was in their possession all along.

Defendants offer no explanation for why the contracts were not presented at the time of the initial class certification motion.

Whether a case is likely to proceed as a class or individual action may greatly impact resource allocation decisions made by plaintiffs and their counsel. Of course, as the majority notes, district courts have the discretion to reconsider a prior order certifying a class. But litigants have an obligation to bring forward pertinent information on the class certification question as soon as possible, so as to avoid wasting resources on a case that ultimately will not be treated as a class action. Where this obligation has not been met, the district court, at a minimum, should consider alternative class management options – for example, here, whether subclasses could be created based on each type of contract.

I therefore would remand on the decertification issue for consideration of alternatives to decertification. As the majority does not do so, I respectfully dissent as to the decertification issue only.